Supreme Court, U.S.
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In the Supreme Court of the United States

WESTFALIA-SURGE, INC.,

Petitioner,

v.

MARIPOSA FARMS, LLC,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a process known as reasoning to the best inference is an acceptable methodology under *Daubert/Kumho*[1] to support an opinion that a product is inadequate (*i.e.* defective) when established and accepted protocols developed by the American Society of Agricultural Engineers ("A.S.A.E.") are the only reliable and acceptable means of determining the functional adequacy of the product?

2. Whether reasoning to the best inference can substitute for test results when test results are inadmissible because the plaintiff, after conducting ASAE sanctioned tests, changed the product in order to prevent testing by the defendant?

3. Whether a less reliable methodology can be utilized to support causation when the industry sanctioned methodology is excluded from evidence because of the misconduct of the claimant *i.e.* should that be the death knell of the claimant's case?

4. Whether unreliable expert testimony can be substituted for reliable expert testimony when the latter is unavailable because of the misconduct of the proponent particularly when the unreliable testimony is a sham?

5. Whether the District Court and the Court of Appeals deviated from the universally accepted standard for determining if an error by the District Court was

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[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)

harmless *i.e.* whether it can be said that it did not affect the verdict?

6. Whether erroneously permitting a highly credentialed engineer who specializes in analysis of functional adequacy of the product in question to testify that the product is defective must be deemed to have influenced a verdict holding that the product was defective?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

All parties to the proceeding in the Court of Appeals, whose judgment is sought to be reviewed, are set forth in the caption of the case. Westfalia-Surge, Inc. ("Westfalia") is a wholly owed subsidiary of GEA AG which is a public company traded in Germany.

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OPINIONS

The opinion of the Court of Appeals (A-1–7)[2] is not reported . However, with the adoption of Rule 32.1 F.R.A.P. effective December 1, 2006, unpublished decisions take on a new significance. The decision of the District Court denying Westfalia's motion for judgment as a matter of law or in the alternative for a new trial, is also unreported.(A-8–18).

JURISDICTION

The judgment of the Court of Appeals was entered on January 8, 2007. (A-1). A timely petition for rehearing was denied on February 14, 2007, and this Petition for Writ of Certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1). The District Court had jurisdiction under 28 U.S.C. §1332.

STATUTES INVOLVED

Rule 702 of the Rules of Evidence for United States Courts and Magistrates provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the

[2] The opinion below is reproduced in the appendix to this petition and "A" page references are to the appendix.

witness has applied the principles and methods reliably to the facts of the case.

STATEMENT OF THE CASE

This is a case involving the alleged malfunction of a milking system allegedly causing an infection of the dairy cows' udders known as mastitis which results in reduced milk production.

Mastitis may result if a significant level of vacuum instability occurs within the milking system.

Vacuum stability involves the concept of movement of air inside a closed milking system. The only way to evaluate vacuum stability is through testing with a measuring device pursuant to protocols approved by the American Society of Agricultural Engineers ("ASAE") and adopted by the National Mastitis Counsel.

Sybren Reitsma, Ph.D., a professional engineer and specialist in testing and analysis of milking systems and their role in the causation of mastitis was retained by Mariposa Farms, LLC ("Mariposa") to test its milking system prior to commencement of litigation against Westfalia-Surge, Inc. ("Westfalia"), a designer of the system. Dr. Reitsma performed tests pursuant to the protocols established by the American Society of Agricultural Engineers. He recommended that certain changes be made to the milking system in order to eliminate vacuum instability which he claimed to have detected through his testing. Dr. Reitsma, who was referred to Mariposa by David Domina, counsel for Mariposa in this action and Robert Corbett, D.V.M., an expert witness for Mariposa in this action, jointly agreed that the results of the tests and the proposed changes not be disclosed to Westfalia prior to making the changes (A-23–24).

Because Westfalia was foreclosed from the opportunity to test the milking system prior to the changes which eliminated any possibility of replicating and refuting Dr. Reitsma's claimed test results, Dr. Reitsma's opinions and conclusions based upon his testing were excluded from evidence by the district court.

Westfalia moved for summary judgment on the basis of the inadmissibility of the only reliable methodology of determining the functional adequacy of the milking system. The motion was denied which led to the debacle which brings Westfalia to this Court.

Despite testimony by Dr. Reitsma in his deposition that the only method for determining the functional adequacy of the vacuum in a milking system was through utilization of tests conducted in accordance with ASAE protocols, the District Court allowed Dr. Reitsma to testify. Dr. Reitsma's testimony consisted of the disclosure of his impressive credentials and extensive experience and his opinion that, based upon talking to the principal of Mariposa and looking at photographs supplied by the principal of Mariposa, he was of the opinion that the system was functionally inadequate causing mastitis.

Post verdict, the District Court confessed error in admitting Dr. Reitsma's testimony, but denied judgment as a matter of law or a new trial on the grounds that there was sufficient other evidence to sustain the verdict. (A-11–12; A-16) In denying the motions the District Court did not determine whether Dr. Reitsma's testimony affected the verdict against Westfalia.

There was no other engineering testimony which supported the jury's verdict. The District Court relied upon testimony by Robert Corbett, D.V.M., a veterinarian who had

not been on the farm prior to the changes which resulted in a ruling precluding use of the tests performed by Dr. Reitsma.

Dr. Corbett conceded prior to trial that the only reliable method for determining the functional adequacy of vacuum within a milking system was testing pursuant to ASAE protocols. Nevertheless, he was allowed to testify over the objection of Westfalia (A-21). The opinion upon which the District Court relied in denying the motion for judgment as a matter of law or in the alternative for new trial, was as follows:

> Q. Doctor, after you had included the work that you have described in connection with Mariposa, were you able to form opinions as a bovine veterinarian, based upon your education, training, your experience here, and reasonable professional certainty - -
> A. Yes.
> Q -- about what caused this herd-wide mastitis problem?
> A. Yes.
> Q. What did you conclude?
> MR. TONDRE: Your Honor, I'm going to object to this because of what we've previously discussed regarding his basis in his report.
> THE COURT: No, overruled. Go ahead.
> A. My opinion was that I had never, ever seen this rapid of spread of mastitis in a herd before. And in other cases where I had seen a rapid spread, it was always involved with abnormally functioning milking equipment.
> So that was my main opinion, was that the equipment had to be the source of the problem, to spread from cow to cow.

(A-20–22)

This is akin to an opinion that all Indians march in single file because all Indians I have seen marching were marching in single file.

Prior to trial both Drs. Reitsma and Corbett relied upon Dr. Reitsma's ASAE protocol testing to support their opinions that the milking system caused mastitis in the Mariposa herd. To allow them to testify after the testing was stricken is to permit testimony which is without the foundation required by Rule 702 and to permit a sham.

Dr. Corbett, also testified that management was not at fault for spread of mastitis. The jury obvious rejected this opinion since it found Mariposa to be 60% at fault for its losses.

The Court of Appeals, in reliance upon Dr. Corbett's testimony, refused to grant judgment as a matter of law or a new trial. In that regard the Court of Appeals stated (A-4):

> In this case, Dr. Corbett's use of a process known as reasoning to the best inference to arrive at his conclusions was sufficiently reliable under *Daubert* and *Kumho*, and the District Court did not abuse its discretion in admitting his testimony. Dr. Corbett reviewed the lab reports indicating an unusually rapid spread of mastitis, analyzed Mariposa's management and maintenance of the dairy farm, and used his expertise to deduce that the milking system defect caused the mastitis outbreak. Specifically, he opined that while mastitis could spread in properly-functioning milking machines, the mastitis could not spread so rapidly as it did here unless there was a malfunction.

The Court of Appeals relied upon its decision in *Bitler v. A.O. Smith Corp.*, 391 F.3d 1114, 1124 (10th Cir. 2004) as establishing that Dr. Corbett's methodology was scientifically valid. This acceptance of Corbett's methodology comes in the face of:

> Dr. Corbett's pretrial concessions (1) that ASAE testing is the accepted methodology for determining functional adequacy and (2) that he relied on Dr. Reitsma's testing to reach his conclusion that the product was defective; and
>
> Dr.Corbett's inability at trial to rely on the ASAE testing done by Dr. Reitsma because of the spoliation ruling.

The Court of Appeals affirmed the District Court's denial of a motion for new trial, quoting with approval the following conclusion of the District Court (A-6):

> The Court readily acknowledges that, absent Dr. Reitsma's testimony, there is decidedly less evidence in the record for the jury to have properly relied upon in finding liability on the part Defendant ... [but] the Court finds sufficient evidence remains in the record to support the verdict and that the Court's error in allowing Reitsma's testimony did not adversely affect a substantial right Defendant.

The Court of Appeals went on to state (A-6–7):

> As discussed above, Dr. Corbett's testimony provided the jury with sufficient evidence to find that Westfalia was negligent and breached its warranties. He studied the

> milking machine, Mariposa's management, and through the logic of best inference, reasonably deduced that the milking machine was defective because he had never seen a mastitis outbreak spread so rapidly where defective equipment was not the culprit. This methodology was reliable and provides a sufficient basis to conclude that the milking machine was defective. The jury also heard corroborating lay testimony of several witnesses, including Westfalia dealer Jerry Danforth, and engineer Graeme Mein who testified that the vacuum regulator was improperly installed and could result in vacuum and pulsation problems.

The approach taken to sustain the verdict has the effect of sanctioning a sham by permitting unreliable expert testimony to be substituted for reliable expert testimony when the latter is excluded because of the misconduct of the proponent.

Neither the District Court nor the Court of Appeals applied the long-standing established standard for determining whether erroneously admitted evidence was harmless error. Here the erroneously admitted evidence was that of the only engineer to testify that the milking equipment probably caused the injury.

The standard established by this Court is that the erroneous admission of evidence is harmless only if other competent evidence is sufficiently strong to permit the conclusion that the improper evidence had no effect on the decision. Here the Court of Appeals failed to apply that standard simply holding that there was sufficient other evidence to sustain the verdict. Neither the Court of Appeals

nor the District Court held that the erroneously admitted testimony of Dr. Reitsma had "no effect on the decision."

The Court of Appeals approach to determination of harmless error here is at variance with the decisions in *Olitskey v. Spencer Gifts, Inc.*, 842 F. 2d 123, 127 (5th Cir. 1988) and *Mike's Train House, Inc. v. Lionel, LLC*, 472 F.3d 398, 409-410 (6th Cir. 2007) where, in *Mike's Train House* the Court stated:

> Under Rule 702 and 703, the District Court abused its discretion in admitting Stein's testimony regarding (1) his conclusions about the degree of copying between the design drawing pairs, and (2) the similarity between his conclusions and Lee's. We may, however, overturn the jury's verdict based upon this evidentiary error only if they were not harmless. *Smithers*, 212 F.3d at 317. The harmless-error standard provides that if "one cannot say, with fair assurance, ... that the judgment was not substantially swayed by the error, it is impossible to conclude that the substantial rights were not affected." *DePew v. Anderson*, 311 F.3d 742, 751 (6th Cir. 2002) (Quoting *Kotteakos v. United States* 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)).
>
> Stein's testimony likely had a substantial effect on the verdict. Stein was the only expert to testify about the degree of copying between the drawing pairs. Without his testimony, the jury would not have learned of Lee's conclusions, nor would they have heard from the other expert witness regarding the

> degree of copying. Furthermore, as Lionel points out, of the 3307 drawing pairs, only eleven were presented to the jury. Because MTH relied upon Stein's testimony as its source of expertise and analysis regarding the degree of copying, it is impossible to conclude with any certainty that Stein's testimony did not sway the jury verdict. We therefore remand for a new trial. ...

Here it cannot be said with any certainty that the jury accepted Corbett's opinion as to causation since it rejected a material element thereof, that Mariposa was not at fault for its own loss. Had the District Court and the Court of Appeals applied this standard, a different result was mandated. Failure to apply the standard violates both this Court's long-standing established standard and the standards of two other Circuits. Additionally, the Circuit Court ignored its own pronouncement in *Gobel v. Denver and Rio Grande Western Railroad Company*, 215 F.3d 1083, 1089 (10th Cir. 2000):

> Erroneous admission of evidence is harmless only if other competent evidence is "sufficiently strong" to permit the conclusion that the improper evidence had no effect on the decision." *Lillie v. United States*, 953 F.2d 1188, 1192 (10th Cir. 1992). Mr. Gobel argues that there was sufficient uncontroverted evidence of psychological injuries and post-traumatic stress disorder to uphold a judgment, regardless of the admissibility of Teitelbaum's testimony. Aplee. Br. at 52. However, as the Railroad points out, evidence of psychological injury does not account for Mr. Gobel's claims of

> physical injury, particularly organic brain injury. Dr. Teitelbaum's testimony was a large part of plaintiff's case because it helped to establish the medical causal link between the incident in the Moffat Tunnel and the alleged permanent brain injury. We are unable to say that Dr. Teitlebaum's testimony had no effect on the decision of the jury in awarding damages for pain and suffering and loss of enjoyment of life, and therefore remand for trial.

REASONS FOR GRANTING THE WRIT

In an effort to prevent miscarriages of justice as a result of testimony based upon "junk science," this Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). It is respectfully submitted that the principle of reasoning to the best inference accepted in *Bitler v. A.O. Smith Corp.*, 391 F.3d 1114 (10th Cir.) has no place in supporting reliability of engineering principles but must be relegated to differential diagnosis by physicians. No other Circuit Court has applied the differential diagnosis methodology to engineering opinions. To apply a process known as reasoning to the best inference in the face of the existence of engineering protocols for determining functionality is to emasculate the principles espoused by *Daubert* and *Kumho*.

As noted in *Kumho* at 157, nothing in *Daubert* or the Federal Rules of Evidence sanctions an opinion which is applicable only because of the *ipse dixit* of the expert.

Likewise, there must be some safeguard against *post hoc* rationalization when, after a verdict, the District Court realizes it erroneously admitted expert testimony.

While reasoning to the best inference may be an accepted methodology in the diagnosis of diseases, it has no place outside that realm. It is imperative that this misadventure of applying reasoning to the best inference instead of industry accepted protocol testing be nipped in the bud lest *Daubert/Kumho* be emasculated by this scientific pretender.

Bitler's reasoning to the best inference, a methodology founded upon the principles of differential diagnosis, cannot be permitted to substitute for an engineering principle when the question is for example, whether a medical device is defective.The fact that Dr. Corbett is a veterinarian does not give him a license to apply veterinary medical principles when engineering principles are controlling.

Here Dr. Reitsma's testimony regarding testing was rejected due to his misconduct but both Drs. Corbett and Reitsma were allowed to testify on bases other than industry standard testing.

Kumho at 154 pointed out that "[t]he relevant issue was whether the expert could reliability determine the cause of the tire's separation." Here there was a reliable methodology for making the determination and a substitute must not be permitted, particularly under these circumstances.

It is respectfully submitted that this Court must establish that reasoning to the best inference has no place in the *Daubert/Kumho* analysis when a more reliable methodology is available. The process of "eliminating alternative possible causes" when there is an acceptable method of testing for the

functionality of a piece of equipment is to reintroduce junk science into the federal venue.[3] Reasoning to the best inference hardly suffices as an acceptable methodology in the face of an adopted and peer reviewed methodology that takes the junk out the science.

Dr. Corbett's "methodology" does not even rise to the level of reasoning to the best inference. It is clearly junk science since the basis for his reasoning is that he, personally, had never seen mastitis spread this fast absent malfunctioning equipment. If this Court is going to permit reasoning to the best inference to be a basis for causation, it must establish guidelines which make reasoning to the best inference scientifically acceptable. While reasoning to the best inference may be well known in the medical profession, it certainly is not acceptable proposition in the engineering profession.

Rule 702 F.R.E. requires that expert testimony:

1. be based upon sufficient data;

2. be the product of a reliable methodology; and

3. be based upon a reliable application of the methodology.

It is respectfully submitted that a methodology which fails to apply test protocols accepted by the relevant specialty as the only reliable method of evaluation of performance can never be (1) based upon sufficient data, (2)

[3] This is particularly egregious here since both Drs. Reitsma and Corbett conceded that the only true method for determining functional adequacy of a milking system is through testing protocols established by the American Society of Agricultural Engineers and adopted by the National Mastitis Counsel.

the product of a reliable methodology, or (3) the result of a reliable application of a reliable methodology.

Certiorari must be granted in order to prevent the clear and present danger that reasoning to the best inference will displace application of sound scientific principles as the opinion of choice. To allow reasoning to the best inference as an acceptable methodology is to permit what *Kumho* condemned: opinion based upon the *ipse dixit* of the expert.

Allowing testimony such as that allowed here is not an abuse of discretion by the gatekeeper, it is a failure to exercise discretion.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for The Tenth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARIPOSA FARMS, LLC,
Plaintiff-Appellee,

v.

No. 05-2344
(D.C. No. CIV-03-0779)
(D. N.M.)

WESTFALIA-SURGE, INC.,
Defendant-Appellant.

ORDER AND JUDGMENT*

Before LUCERO, SILER,** and O'BRIEN, Circuit Judges.

Westfalia-Surge, Inc. ("Westfalia") appeals the district court's denial of its motion for judgment as a matter of law, or in the alternative, for a new trial. For the following reasons, we AFFIRM.

I. BACKGROUND

In July 2003, Mariposa Farms, Inc. ("Mariposa") filed suit against Westfalia alleging negligence and breach of

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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 (eff. Dec. 1, 2006) and 10th Cir. R. 32.1 (eff. Jan. 1, 2007).

**The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

warranty resulting from the installation and operation of cow-milking equipment manufactured by Westfalia. Mariposa alleged that the equipment malfunction created unstable vacuum pressure, which eventually caused mastitis to spread throughout its herd.

At trial, Mariposa expert witness Dr. Sybren Reitsma testified that, based on photographs and conversations with Mariposa's principal manager Larry Skelley, it was his expert opinion that the design and installation of Westfalia's vacuum system caused the unstable vacuum pressure which led to the mastitis outbreak. Another Mariposa expert witness, Dr. Robert Corbett, opined that the milking machine equipment malfunction caused the mastitis spread because, in his experience, the bacteria could not spread as rapidly as it did without the presence of a milking machine malfunction.

The jury found Westfalia thirty percent liable and apportioned damages accordingly. Westfalia filed a motion for judgment as a matter of law, or in the alternative, for a new trial. In denying both motions, the district court admitted that it erred in permitting the testimony of Dr. Reitsma because rather than basing his opinion on test results that he identified as the only reliable and acceptable means by which to measure vacuum pressure and function, he based his opinion on photographs of the machine and conversations with the dairy's manager. However, the district court still denied both Westfalia motions, finding that sufficient evidence remained to support the verdict and that the error did not adversely affect a substantial right of Westfalia. Westfalia now appeals.

II. DISCUSSION

A. Westfalia's Motion for Judgment as a Matter of Law

Westfalia contends that judgment as a matter of law in its favor is appropriate because insufficient evidence of causation remains once Dr. Reitsma's testimony is properly excluded. It argues that Dr. Corbett provided the only other causation evidence, but that his testimony should also have been excluded for the same reasons as Dr. Reitsma's testimony.

We review *de novo* the denial of a motion for judgment as a matter of law. *Miller v. Eby Realty Group LLC,* 396 F.3d 1105, 1110 (10th Cir. 2005). All reasonable inferences are drawn in favor of the nonmoving party, and the jury's verdict will be set aside only if the evidence points but one way. *Minshall v. McGraw Hill Broad. Co.*, 323 F.3d 1273, 1279 (10th Cir. 2003).

Westfalia asserts that Dr. Corbett's expert testimony should have been excluded because his method for determining the existence of a defect in the milking machine was unreliable under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (1997), because it was not based on the generally accepted standards promulgated by the American Society of Agricultural Engineers ("ASAE").

We review the manner in which the district court exercised its *Daubert* "gatekeeping" role for an abuse of discretion. *General Elec. Co. v. Joiner*, 522 U.S. 136, 139 (1997). "Under *Daubert's* reliability prong, 'an inference or assertion must be derived by the scientific method... [and] must be supported by appropriate validation – i.e., "good grounds," based on what is known.'" *Hollander v. Sandoz Pharm. Corp.*, 289 F.3d 1193, 1205 (10th Cir. 2002) (quoting *Daubert*, 509 U.S. at 590). The basis question is whether the expert used "the methods and procedures of

science," *Daubert*, 509 U.S. at 595, and "the level of intellectual rigor of the expert in the field." *Kumho Tire*, 526 U.S. at 152.

In this case, Dr. Corbett's use of a process known as reasoning to the best inference to arrive at his conclusions was sufficiently reliable under *Daubert* and *Kumho*, and the district court did not abuse its discretion in admitting his testimony. Dr. Corbett reviewed the lab reports indicating an unusually rapid spread of mastitis, analyzed Mariposa's management and maintenance of the dairy farm, and used his expertise to deduce that the milking system defect caused the mastitis outbreak. Specifically, he opined that while mastitis could spread in properly-functioning milking machines, the mastitis could not spread so rapidly as it did here unless there was a malfunction.

Westfalia urges that because Dr. Reitsma identified testing pursuant to ASAE standards as the generally accepted method to discover milking machine defects, anything else, including Dr. Corbett's method of reasoning to the best inference, is unreliable. However, as *Daubert* explicitly recognizes:

> "General acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence – especially Rule 702 – do not assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

Daubert, 509 U.S. at 597.

Here, Dr. Corbett's testimony was based on a scientifically valid method, *see Bitler v. A.O. Smith Corp.*, 391 F.3d 1114, 1124 (10th Cir. 2004) (finding reasoning to the best inference reliable under Daubert and Kumho), and the district court was proper in admitting it.

Therefore, the district court properly denied Westfalia's motion for judgment as a matter of law because Dr. Corbett's testimony provided sufficient causation evidence from which a jury could conclude that Westfalia was negligent.

B. Westfalia's Motion for a New Trial

Westfalia next argues that the district court improperly denied its motion in the alternative for a new trial despite its own acknowledged error in admitting Dr. Reitsma's testimony. It contends that Dr. Reitsma's testimony was impermissibly prejudicial because, given his qualifications and experience, it had a significant impact on the jury's verdict.

We review the denial of a motion for a new trial for an abuse of discretion. *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 514 (10th Cir. 1998). A new trial will only be granted if the district court "made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Sheets v. Salt Lake County*, 45 F.3d 1383, 1390-91 (10th Cir. 1995) (quoting *Hinds v. General Motors Corp.*, 988 F.2d 1039, 1046 (10th Cir. 1993)).

Erroneous admission of expert testimony does not require setting aside the jury verdict unless the evidence caused actual prejudice and affected a substantial right. Fed. R. Civ. P. 61; *Praseuth v. Rubbermaid, Inc.*, 406 F.3d 1245, 1253 (10th Cir. 2005). We have held that "[e]rroneous

admission of evidence is harmless only if other competent evidence is 'sufficiently strong' to permit the conclusion that the improper evidence had no effect on the decision." *Goebel v. Denver & Rio Grande W.R.R. Co.*, 215 F.3d 1083, 1089 (1st Cir. 2000) (citing *Lillie v. United States*, 953 F.2d 1188, 1192 (10th Cir. 1992)).

Westfalia argues that the district court erred because it did not apply the "sufficiently strong/no effect" harmless error standard to determine the effect of Dr. Reitsma's testimony on the verdict. It takes issue with the district court's statement in the order denying Westfalia's motion for a new trial that:

> The Court readily acknowledges that, absent Dr. Reitsma's testimony, there is decidedly less evidence in the record for the jury to have properly relied upon in finding liability on the part of the Defendant..., [but] the Court finds sufficient evidence remains in the record to support the verdict and that the Court's error in allowing Reitsma's testimony did not adversely affect a substantial right of Defendant.

As discussed above, Dr. Corbett's testimony provided the jury with sufficient evidence to find that Westfalia was negligent and breached its warranties. He studied the milking machine, Mariposa's management, and through the logic of best inference, reasonably deduced that the milking machine was defective because he had never seen a mastitis outbreak spread so rapidly where defective equipment was not the culprit. This methodology was reliable and provides a sufficient basis to conclude that the milking machine was defective. The jury also heard corroborating lay testimony of several witnesses, including Westfalia dealer Jerry Danforth

and engineer Graeme Mein, who testified that the vacuum regulator was improperly installed and could result in vacuum and pulsation problems.

The district court was in the best position to determine the effect of Dr. Reitsma's testimony and its analysis did not abdicate its role in properly gauging its effect. Given that Dr. Corbett testified as to causation, and that his testimony was supported by other witnesses, the denial of Westfalia's motion was not an abuse of discretion.

AFFIRMED.

Entered for the Court,

Eugene E. Siler, Jr.
Senior United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

MARIPOSA FARMS, LLC, a New Mexico limited liability company,
Plaintiff,

vs. No. CIV-03-0779 JC/LAM

WESTFALIA-SURGE, INC., an Illinois corporation,
Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendant's *Motion for Judgment as a Matter of Law or, in the Alternative for New Trial Pursuant to Rules 50(b) and 59 F.R.C.P.*, filed May 12, 2005 (*Doc. 269*) ("Motion"). Having considered the Motion, the parties' submissions, the relevant authority, and being otherwise fully advised, the Court finds the Motion not well-taken and it is, therefore, denied.

I. Background

This matter came on for jury trial April 12, 2005 through April 27, 2005. At the close of Plaintiff's case and again at the close of all evidence, Defendant made timely motions for judgment as a matter of law as to Plaintiff's negligence, breach of express warranties, and breach of implied warranties claims.[1] The motions were denied and the

[1]These three causes of action alone were submitted to the jury, Plaintiff having abandoned all others prior to submission.

case was submitted to the jury. On April 27, 2005, the jury returned the Special Verdict Form finding liability on the part of Defendant and total damages in the amount of $8,732,072. The jury apportioned 60% of fault to Plaintiff Mariposa Farms, LLC; 30% to Defendant Westfalia-Surge, Inc., including any conduct of Five Star Equipment, Inc. that was as Westfalia's agent; and 10% to non-party Rota-Tech Dairy Sheds Ltd. On April 28, 2005, the Court entered judgment in favor of Plaintiff and against Westfalia-Surge, Inc. in the amount of $2,619,621.60. Defendant Westfalia-Surge presently moves the Court for judgment as a matter of law or a new trial. The bases for Defendant's Motion are: 1) expert testimony presented which Defendant contends was inadmissible pursuant to established Daubert and Kumho Tire standards; 2) insufficient evidence to support liability and damages; and 3) necessity for a new trial based in part on the Special Verdict form which Defendant asserts did not provide the opportunity for the jury to pass on the question of agency.

II. Standards of Review

A. Judgment as a Matter of Law

Rule 50(b) states in pertinent part:

> If for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion... [I]n ruling on a renewed motion, the court may... if a verdict was returned... allow the judgment to stand, order a new trial, or direct entry of judgment as a matter of law...

FED.R.CIV.P. 50(b). The Tenth Circuit instructs that a court should not weigh the evidence, pass on credibility of witnesses, or substitute its conclusions for those reached by the jury, but must, nevertheless, "enter judgment as a matter of law in favor of the moving party if 'there is no legally sufficient evidentiary basis... with respect to a claim or defense... under the controlling law. '" *Harolds Stores, Inc. v. Dillard Dep't Stores,* 82 F.3d 1533, 1546-47 (10th Cir. 1996) (citation omitted) (quoting FED.R.CIV.P. 50(A)); *accord Baty v. Willamette Indus.*, 172 F.3d 1232, 1241 (10th Cir. 1999).

B. New Trial

Rule 59(a) states in pertinent part: "[a] new trial may be granted... in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law..." FED. R CIV. P. 59(a). The Tenth Circuit has stated that a motion for a new trial is not regarded with favor and should only be granted with great caution. *United States v. Kelly,* 929 F. 2d 582, 586 (10th Cir. 1991). The decision to grant a motion for a new trial is committed to the trial court's sound discretion. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984). The party seeking to set aside a jury verdict must demonstrate trial error which constitutes prejudicial error, or that the jury verdict was not based on substantial evidence. *See White v. Conoco, Inc.*, 710 F. 2d 1442, 1443 (10th Cir. 1983). In reviewing a motion for a trial, the Court must view the evidence in the light most favorable to the non-moving party. *See Griffin v. Strong*, 983 F.2d 1544, 1546 (10th Cir. 1993).

III. Discussion

Defendant argues that relief from judgment is

warranted, for no competent evidence was adduced at trial to establish that (1) the milking equipment functioned in a defective manner; (2) a functional defect was the probable cause of injury; or (3) absent injury, the herd was capable of producing at the level upon which Dr. Behr founded his damages computations. Defendants contend that the trial testimony from Dr. Reitsma, Dr. Corbett, and Dr. Behr was inadmissible under *Daubert* and *Kumho Tire* and must be determined so at this time. Defendant further asserts that Plaintiff's case "rested entirely on the opinions of [these] three experts." Mot at 2.

Plaintiff responds that Defendant waived any Rule 50(b) post-trial objections to the testimony of Doctors Reitsma and Corbett under *Daubert* by failing to make timely objections thereto in pretrial motions or at trial. *See Mascenti v. Becker*, 237 F.3d 1223, 1230-34 (10th Cir. 2001) (*Daubert* challenges not properly raised for the first time in a Rule 50 motion at close of evidence). Thus, Plaintiff contends, the admission of such expert testimony may only be reviewed for plain error. *See id.* at 1231. Alternatively, Plaintiff argues that, even assuming timely *Daubert* challenges were made, the experts' testimony passes reliability muster nonetheless. Regarding Dr. Behr, Plaintiff contends that the Court correctly ruled on Defendant's objections pretrial, properly determining his testimony to be admissible.

A. Dr. Reitsma (engineer)

The Court first determines that Defendant properly challenged the admissibility of Dr. Reitsma's testimony both pre-trial and at trial. *See* Def's Joint Mot. for Summ. J. Based Upon Failure of Proof of Essential Elements of Pl's Case, filed March 18, 2005 (*Doc. 202*); Trial Tr. at 475-479. Thus, the present challenge should not be viewed disfavorably. *See*

Mascenti v. Becker, 237 F.3d at 1230-34. Next, the Court reviews its ruling on the admissibility of Reitsma's testimony, acknowledging that the testimony is of questionable reliability. Perhaps preoccupied by the task of assuring Reitsma did not tread in areas of barred testimony, the Court conceivably slighted Defendant's challenge to Reitsma's methodology as it existed post-sanction. Imposition of the spoliation sanction on Plaintiff dispossessed Reitsma of the benefit of his testing and all conclusions based thereon. Thus, Reitsma's conclusions at trial were based solely upon photographs, illustrations, and conversations with Mr. Skelley. Yet, prior to imposition of the sanction, Reitsma himself stated emphatically that testing was, in fact, the only reliable and acceptable means by which to ascertain vacuum pressure or function. Reitsma Dep. at 60, 306. When that testimony was eliminated, so, too, was the primary *Daubert-Kumho* basis for Reitsma's conclusions. Upon reviewing Defendant's challenges and the relevant testimony, the Court finds it erred when allowing Reitsma to testify regarding vacuum function or failure when his opinions and conclusions were based not on ASAE industry standards (testing and measurement), but instead on photographs, diagrams, and conversations. Had Reitsma himself not testified that such testing constitutes the only reliable means by which to reach conclusions on key issues, the Court might have a closer question before it now. It was error, however, to allow Reitsma to change his methodology in what amounted to an end-run around the spoliation sauctions imposed upon Plaintiff. That said, the primary question in need of resolution here is whether sufficient evidence of liability exists independent of Reitsma's testimony.

B. Dr. Corbett (veterinarian)

Here, Plaintiff correctly identifies that Defendant

failed to file a motion *in limine* raising *Daubert* objections to Dr. Corbett's testimony, nor was any such objection raised at trial. Thus, the Court properly declines to entertain the challenges now. *See Mascenti v. Becker,* 237 F.3d at1230-34. Moreover, assuming, arguendo, the Court were inclined to entertain Defendant's untimely credibility challenges to Corbett's testimony, the challenges relate to weight, rather than admissibility. As such, cross examination at trial provided Defendant the proper venue to challenge Corbett's conclusions.

C. Dr. Behr (economist)

It is beyond reasonable dispute that Defendant properly challenged the admissibility of Dr. Behr's testimony. *See* Mot. to Bar or Limit the Testimony of Michael Behr, filed November 30, 2004 (*Doc. 146*); Tr. Transcript at pp. 850, 859.

When challenging admissibility of Dr. Behr's testimony, Defendant focuses on the fact that Behr failed to incorporate data available from the Skelley's former operation, Causey Dairy, when calculating what he termed the "Normal Trend" in production and which he compared to the actual production at Mariposa Dairy. Defendant cites *Quinones v. Pennsylvania,* 804 F.2d 1167, 1169-71 (10th Cir. 1986) for support. The Court, however, finds *Quinones* distinguishable from the present case. In that case, District Judge Black disallowed expert testimony on lost earnings as irrelevant, finding no proper foundation for using the wage figures for factory workers who manufactured jewelry when computing the lost income of a self-employed watch repairman. *Id.* at 1171. The Tenth Circuit held the district court was within its discretion when concluding that the income of a factory worker, presumably determined by hourly wage, could not be fairly equated with that of plaintiff

self-employed businessowner/tradesman. The district court properly excluded the irrelevant testimony in favor of plaintiff's own tax returns from prior years. The *Quinones* reasoning does not apply here. The Court cannot reasonably determine that the state-wide averages used by Behr are irrelevant to the potential production at Mariposa. Nor, for that matter, is extensive analysis of *Craig v. Champlin Petroleum Co.*, 435 F.2d 933 (10th Cir. 1971), required to determine that that case, also cited by Defendant, does not bear significantly on the analysis of Behr's testimony in the instant matter.[2]

Finally, ample evidence was indeed presented to the jury regarding the less-than-average production and revenues generated by Causey Dairy, as well as the purported mismanagement of both Causey and Mariposa dairies. Defendant itself acknowledges that Behr's "assumption was clearly rejected by the jury which found Mariposa 60 percent at fault for its business losses." Mot. at 22. The Court agrees; apparently Behr's testimony was successfully rebutted. Thus, Defendant's position here tends to abrogate any finding that admission of Behr's testimony prejudicially affected a substantial right of Defendant's. *See White v. Conoco, Inc.*, 710 F.2d at 1443. All things considered, the Court finds no prejudicial error in allowing Behr's testimony and, therefore, adheres to its prior ruling. *See* Mem. Op. and Order, filed March 31, 2005 (*Doc. 216*).

D. Sufficiency of Properly Admitted Evidence

Defendant's position is perhaps best summarized as

---

[2]In *Craig*, an expert's opinion that a market existed was of diminished value as impermissively speculative and based on conjecture where no specific, available market or buyer for the subject casinghead gas was identified within the relevant geographic area.

follows: "The jury in this case was given no more reason to believe that the placement of the regulator, or the placement of the two-inch milk line, made the machine dangerous to cows than if the complaint was that the device was painted an unusual color." Reply at 5.

Plaintiff responds that the Westfalia manual itself establishes that the vacuum regulator manufactured by Westfalia and installed in accordance with instruction provided by Westfalia's teaching schools was misplaced. The placement of the regulator on the Mariposa system was in violation of the schematics found in the Westfalia manual. Also, Defense witness Cunningham testified that vacuum regulation is critical. Defense expert Dr. Johnson, too, acknowledged that a misplaced vacuum regulator can create a dangerous situation. Johnson also conceded that mastitis can be spread through the milking machine, though he did not conclude that is what occurred at Mariposa. Dr. Corbett testified to his belief that the Mariposa milking machine did not properly milk the cows. Dr. Corbett also testified that the defect in the Mariposa milking machine caused mastitis to be propagated and spread throughout the Mariposa herd because, in his opinion, faulty equipment is the only way mastitis can spread as quickly as it did at Mariposa. Corbett's conclusion was based, in significant part, on lab reports showing the rapid rate at which new infections were occurring in the Mariposa herd. The lab work also revealed that the mastitis at Mariposa was caused by a contagious organism. Corbett opined that, to his knowledge, the only way for such an organism to spread is through the milking equipment. Corbett ultimately found, through his testing, that vacuum stability was excellent after relative changes had been made to the system. Finally, and quite significantly, Five Star's records document that ongoing vacuum and pulsation problems existed with the milking machine at Mariposa.

The Court readily acknowledges that, absent Dr. Reitsma's testimony, there is decidedly less evidence in the record for the jury to have properly relied upon in finding liability on the part of Defendant. However, the Court strongly disagrees with Defendant's assertion that misplacement of a vacuum regulator is reasonably analogous to installation of, say, a chartreuse device. *See* Reply at 5. Nor, in an likelihood, would changing the color of the device to basic black improve its vacuum stability. Instead, the Court finds sufficient evidence remains in the record to support the verdict and that the Court's error in allowing Reitsma's testimony did not adversely affect a substantial right of Defendant.

E. Agency

Defendant contends that the Special Verdict form presented to the jury in this matter was in error, for it did not include a special interrogatory item directly asking the jury if it found Five Star was acting as Westfalia's agent. The Court finds this argument is without merit. First, the jury instructions in this case include the following:

INSTRUCTION NO. 16

> An agent is a person who, by agreement with another called the principal, represents the principal in dealings with third persons or transacts some other business, manages some affair or does some service for the principal, with or without compensation. The agreement may be oral or written, and may be either expressed or implied by a course of conduct showing an intention that the relationship exists.
>
> The plaintiff contends, and has the

> burden of proving, that Five Star Equipment, Inc. acted as agent in performing the work under the contract between Mariposa and Five Star.

Additionally, Jury Instruction No. 17 advised the jury regarding agency and right to control while No. 18 instructed on apparent agency. Thus, the jury was properly instructed that it was required to find an agency relationship, with scope of agency and right to control or, alternately, apparent agency. Again, no record objection was made to these particular instructions. In addition to Jury Instructions Nos. 16, 17, and 18, the Special Verdict form, which Plaintiff and Defendant ultimately submitted to the Court as agreed upon, allowed the jury to apportion fault to "Westfalia-Surge, Inc., including any conduct of Five Star Equipment, Inc. that was as Westfalia's agent" and/or to "Five Star Equipment, Inc. as an independent entity and not as an agent of of Westfalia-Surge, Inc."[3] Taken in tandem, the instructions and verdict form necessarily establish the jury's determination that the agency relationship existed.

IV. Conclusion

In summary, the Court finds sufficient evidence on the record, exclusive of Dr. Reitsma's testimony, for a reasonable jury to find the liability assessed and the damages awarded in this case. Thus, judgment as a matter of law would be inappropriate and the Rule 50 motion is denied. Further, the verdict is supported by the weight of the properly admitted evidence and a new trial is not warranted.

---

[3]Thirty percent of total fault was assessed against the former, while no fault was assessed against the latter.

It is the Court's reasoned determination that the verdict should stand.

WHEREFORE,

IT IS ORDERED that Defendant's *Motion for Judgment as a Matter of Law or, in the Alternative, for New Trial Pursuant to Rules 50(b) and 59 F.R.C.P.*, filed May 12, 2005 (*Doc. 269*), is DENIED.

Dated October 6, 2005.

/s/
ENIOR UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

MARIPOSA FARMS, LLC,
a New Mexico limited liability company,
Plaintiff,

vs. No. CIV-03-0779 JC/LAM

WESTFALIA-SURGE, INC.,
an Illinois corporation,
Defendant.

JURY TRIAL, VOLUME IV

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE JOHN EDWARDS CONWAY, Senior United States District Judge, Albuquerque, New Mexico, commencing at 9:00 a.m. on Friday, April 15, 2005.

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[DATE STAMP
MADISON HARBOUR
& MROZ
MAY 24 2005]

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* * * * *

percentage of those animals are subclinical and show no abnormality in the milk, but the mammary tissue is being destroyed, what we see is that the size of that particular quarter of the mammary gland actually shrinks up and becomes smaller.

So when you're out in the corral, you can look at animals and see that one of the quarters, or more, is much smaller than the other quarters.

Q. Is there some normal symmetry to them?

A. Yes.

Q. Doctor, after you had included the work that you have described in connection with Mariposa, were you able to form opinions as a bovine veterinarian, based on your education, training, your experience here, and reasonable professional certainty –

A. Yes.

Q. – about what caused this herd-wide mastitis problem?

A. Yes.

Q. What did you conclude?

MR. TONDRE: Your Honor, I'm going to object to this because of what we previously discussed regarding his basis in his report.

THE COURT: No, overruled. Go ahead.

A. My opinion was that I had never, ever seen this rapid of spread of staph mastitis in a herd before. And in other cases where I had seen a rapid spread, it was always involved with abnormally functioning milking equipment.

So that was my main opinion, was that the equipment had to be the source of the problem, to spread from cow to cow.

Q. Doctor, did you make sufficient observations so you were able to form professional opinions about the quality of the care given in the milking process and in the cow care process by Mr. Skelley and his personnel?

A. Yes.

Q. What did you observe and conclude in that regard?

A. Well, my observations there were that they were using excellent milking procedures. The animals were being cleaned and disinfected prior to the milking process. They were being fore-stripped, which is remove several squirts of milk prior to attachment of the machine, and that flushes any bacteria out that might be in the teat canal before the milking process. The machines were attached properly. And after the cow was done milking, they were dipped with the approved sanitizing teat dip.

Q. Dr. Corbett, in the course of your work here, did you become aware that there had been a number of deaths and a change in the culling practices in this herd?

A. Yes.

Q. And did you form any opinions about the correlation

Sybren Y. Reitsma

From:	"David Domina" <DAD@dominalaw.com>
To:	<Lacto@sympatico.ca>; <skelley@yucca.net>
Cc:	<cowdoc@dairy-health.com>; "James Cann" <JFC@dominalaw.com>; "Tamara Savard" <tas@dominalaw.com>; <mbehr@mrb.com>
Sent:	June 5, 2003 12:16 PM
Subject:	Re: Mariposa Farms v Westfalia Problem areas

Gentlemen:

1 We expect to be in a position to have a draft Complaint to the Skelley's for review by June 16 and perhaps sooner.

2 The comments below, and data from the Mr Wilcox at City Bank, help with our work here. We have sifted carefully through N M law in an effort to seek maximal recovery and we are continuing this process. Our filing will be made before we have economic data, but as Larry knows from his correspondence with me, I have a working model for what I think the damages look like in broad terms.

3 I am hesitant to have contact with Westfalia a this critical time, too, and hope we can avoid it until after suit is filed. We will be able to meet the June 30 filing deadline Larry Skelley and I discussed when we were together at the dairy.

Respectfully,

David A. Domina
Lawyer
Domina Law pc LLO
ddomina@dominalaw.com

>>> "Sybren Y. Reitsma" <Lacto@sympatico.ca> 06/05/03 11:30 AM >>>

Milking: unstable vacuum level, irregular and insufficient slope of milkline (in some sections), excessive vacuum level drop between receiver or pulsator airline and vacuum pump, air leakage at the receiver (milk pump probe, tee below air injector, receiver bottom and side cover). Results: elevated somatic cell counts due to high incidence of mastitis, reduced milk production and excessive culling of cows.

Cleaning: inadequate, resulting in elevated bacteria counts.

While at your dairy last week, I discussed as one possibility to use the current airline swivel for pulsation only and use a second airline swivel for another airline between the trap (next to the receiver) and vacuum pumps. This would more than double the current airline size and capacity.

You will have noticed from recent emails that I contacted two companies (Deublin & Rotaflow) to locate a suitable swivel. Both of these companies operate worldwide and sell their line of products for a wide range of applications and conditions.

I hesitate to contact Westfalia Surge and Rota-Tech International Ltd. who manufactured, installed and service all the milking equipment. Before I do I would check with you first.

You called me a few minutes ago. I will finish and send this message to you. By this weekend I will send you by email a sketch for improving the layout of the airlines between the two vacuum pumps and milking parlor.

Sybren Reitsma

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(2)

No. 06-1510

FILED
JUN 13 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

WESTFALIA-SURGE, INC.,

Petitioner,

vs.

MARIPOSA FARMS, L.L.C.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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ISSUES PRESENTED

Is the United States Court of Appeals for the Tenth Circuit's unpublished opinion in this state law product liability case worthy of a writ of certiorari even though it presented no doctrinal, and no federal, question?

Is there some inconsistency among the Circuits involving expert evidence and receipt of differential diagnoses by treating physicians, or in this case veterinarians, that requires reconciliation by the United States Supreme Court?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent informs the Court it has no parent company. No publicly traded company holds more than 10% of the stock of Mariposa Farms, L.L.C.

No disclosures are required by Supreme Court Rule 29.6.

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RULES INVOLVED

Fed. R. Evid. 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts in the case.

STATEMENT OF THE CASE

Mariposa Farms, L.L.C. ("Mariposa"), a commercial dairy, sued Westfalia-Surge, Inc. asserting its milking machine's vacuum and pulsation systems were improperly designed, installed, and manufactured. As a result, an organism causing mastitis lived inside the milking machine, and passed from cow to cow and, within cows from udder to udder, and through the milk stream. The milking machine's process caused reverse negative pressures, which allowed small volumes of milk to enter into the teat canal, instead of forcing milk to flow only out of it. This allowed the destructive, flesh eating organism to invade the animals.

Two expert witnesses testified in support of Mariposa's claims at trial: Sybren Y. Reitsma, PhD., and Robert Corbett, D.V.M.

Sybren Y. Reitsma, a professional mechanical engineer who devoted his life to studying milking systems, provided extremely limited testimony based exclusively on photographs, diagrams and telephone interviews without a site inspection or tests. This data, however, was sufficient to allow the engineer to see four inch diameter lines abruptly narrowed to a two inch aperture, restricting air flow, and causing variability in air pressures. Reitsma was definite and unequivocal in his awareness this condition overtly caused dangerous circumstances permitting the milking machine's vacuum system to function improperly, and harm the cows. Reitsma's testimony was allowed at trial, then disallowed on posttrial motions, but the trial court held a second expert witness' testimony provided ample proof.

The second witness, Robert Corbett, D.V.M., a veterinarian, devoted his entire professional life exclusively to treating dairy animals. He testified, based on his scientific testing of milk drawn from udders of the diseased cows, his observations of the dairy and its animals, his familiarity with mastitis and the bacteria causing it, his service on the National Mastitis Council and his vast experience. Dr. Corbett also relied upon his awareness of milking machines, their impact on mastitis, and their role in the disease's development and spread. He concluded that defective milking machine installation and inappropriate vacuum design and installation, along with improper vacuum service by Westfalia-Surge personnel, were the proximate causes of herd-wide mastitis, animal death, and dramatic milk loss in the Mariposa operation.

The Tenth Circuit Court of Appeals affirmed the trial court's decision, and entered judgment for Westfalia-Surge. It upheld the trial court's holding relying on basic

rules. A part of the Court of Appeals analysis is described in the petition for writ of certiorari at pages 5 through 7.

REASONS FOR DENYING THE PETITION

The Supreme Court's review of this state law case is not warranted. This case does not present either:

a) A need to reconcile inconsistent decisions among the circuits; or

b) A decision on an important question of Federal Law that has not been, but should be, settled by the Supreme Court.

Westfalia-Surge's petition asserts its view of the need to correct what it considers erroneous factual findings or the misapplication of a properly-stated rule of law. These are not reasons to grant certiorari. S. Ct. R. 10. What is more, no error requires correction.

Petitioner wants to eliminate the "best inference" analysis approved by the Tenth Circuit, by suggesting it be restricted to physicians and medical diagnoses, but prohibited for veterinarians and diagnoses concerning animal health. This case presents a poor vehicle for analyzing the best inference doctrine because it lies so close to medical practice.

No Doctrinal Issue is Present

No Conflict Exists Among the Circuits

The Court of Appeals' Opinion adhered to its prior holdings that expert witnesses must, at times, make differential findings based on the best inference they can deduce from available evidence. In this case, a veterinarian did so. Petitioner concedes physicians must do so in making differential diagnoses, but complain a veterinarian, treating medical conditions in food-producing animals including dairy cows, should not.

There is no inconsistency between *Bitler v. AO Smith Corp,* 400 F.3d 1227 (10th Cir. 2004), and the *Mariposa* decision. The Tenth Circuit did not err in applying its own precedent.

The best inference language of the Tenth Circuit is nothing more than a requirement that a physician or veterinarian, or other professional, make a differential diagnosis or analysis. Differential diagnoses are routinely recognized and received in evidence. No split in the circuits exists in this regard.

> *Comer v. Schriro*, 463 F.3d 934, 944 (9th Cir. 2006) (holding court-appointed expert had made differential diagnoses of petitioner's various apparent depressive episodes, and attested to such diagnoses with confidence);
>
> *Mattis v. Carlon Elec Products*, 295 F.3d 856, 860 (8th Cir. 2002) (differential diagnosis used by pulmonologist was legally sufficient to establish exposure to organic solvent caused reactive airway dysfunction syndrome; "a medical opinion based upon a proper differential diagnosis is sufficiently reliable to satisfy *Daubert*.");

Hollander v. Sandoz Pharmaceutical Corp, 289 F.3d 1193, 1205 (10th Cir. 2002) (by relying on professional publications, scientific principles, animal studies, differential diagnoses, and case reports, experts did what *Daubert* required);

Zuchowicz v. United States, 140 F.3d 381 386-87 (2d Cir. 1998) (differential diagnosis based partly on scientific articles regarding effect of drug approved); and

Clausen v. M/V New Carissa, 339 F.3d 1049, 1057-59 (9th Cir. 2003) (farm owners' expert permissibly included low-level toxic effects of oil as possible cause of oysters' death in differential diagnoses).

Many courts have approved differential diagnoses where the expert demonstrates the ability to rule out other possibilities:

Lauzon v. Senco Products, Inc., 270 F.3d 681, 693 (8th Cir. 2001) (an expert's causation conclusion should not be excluded because he or she has failed to rule out *every* possible alternative cause);

Hardyman v. Norfolk & Western RY Co., 243 F.3d 255, 261 (6th Cir. 2001) (exclusion of worker's expert testimony based on differential diagnosis was abuse of discretion);

Westberry v. Gislavedgummi AB, 178 F.3d 257, 262-66 (4th Cir. 1999) (differential diagnosis, which is standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated, has widespread acceptance in medical community and provides a valid foundation for an expert opinion); and

> *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1043-44 (2d Cir. 1995) (district court did not abuse discretion in ruling that opinion on causation was admissible, where opinion was based on care and treatment of plaintiff, medical history, pathological studies, product's safety data sheet, reference to scientific and medical treatises, expert's training and experience, as well as differential diagnosis).

There is no confusion among the circuits about the best inference, or the process of differential diagnosis. A medical condition was at issue here; the patients were cows, not people. Testimony from the treating expert that there is no explanation other than the communication of staph aureus bacteria from cow-to-cow through the milking system explains herd-wide staph aureus infection like that present at the Mariposa farm. This testimony was sufficient to establish causation which the jury found was present. The testimony was buttressed by other testimony including extensive admissions from Mariposa's dealer's file and its own file, confirming that the milking system was incorrectly installed.

There is nothing appealing, from the perspective of Supreme Court jurisprudence, about this case's potential use as a vehicle for expressing new legal doctrine, or reconciling Circuit Court inconsistencies. There is also no error present requiring correction.

CONCLUSION

The petition for writ of certiorari is not well founded. It should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

WESTFALIA-SURGE, INC.,

Petitioner,

v.

MARIPOSA FARMS, LLC,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Mariposa in its brief in opposition to Westfalia's Petition for Writ of Certiorari urges denial of the Petition for the reasons that there is no federal question, no conflict and no question worthy of the Supreme Court's resolution.

To the contrary, preservation of this Court's directives in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) requires that the methodology of reasoning to the best inference be limited, lest it be allowed to swallow the principles established by *Daubert* and *Kumho*. All other Circuits have approved the methodology applied by the Tenth Circuit here *only* when applied in the medical context under the label of differential diagnosis.

There is presently a conflict between the Tenth Circuit and this Court. There is also a conflict between the Tenth Circuit and all other Circuits which have limited this approach to the medical context.

ARGUMENT

There is a Federal Question

Jurisdiction in both *Daubert* and *Kumho* was based on diversity of citizenship. *Daubert*, 509 U.S .at 589 held that Rule 702 of the Federal Rules of Evidence controlled in a federal trial. Hence, there can be no doubt that a federal question is presented.

Application Here of Reasoning to the Best Inference Conflicts with *Daubert/Kumho* and All Other Circuits Which Limit it to a Medical Context.

It is undisputed that the only reliable method of determining vacuum fluctuation within a milking system is through testing pursuant to protocols established by the American Society of Agricultural Engineers ("ASAE").

It is Mariposa's claim that vacuum fluctuation within the milking system designed by Westfalia caused damage to its cows.

It is undisputed that there is no evidence of test results demonstrating vacuum fluctuation within the Mariposa system.

Mariposa urges that the Tenth Circuit's "reasoning to the best inference" be allowed to substitute for ASAE testing.

When, as here, a reliable testing procedure is available and required by engineering protocol, there is no reasonable basis for substituting reasoning to the best inference for testing.

Both Dr. Reitsma, an agricultural engineer, and Dr. Corbett, a veterinarian, conceded that it was well accepted that the only method to determine if vacuum fluctuation is sufficient to cause mastitis is through ASAE testing.

Mariposa argues that reasoning to the best inference which is another name for differential diagnosis, is appropriate here because Dr. Corbett is a veterinarian and there should be no distinction between veterinarians and physicians. What Mariposa fails to mention is that Dr. Corbett is being relied upon for an engineering conclusion, not a veterinary medical conclusion. Prior to Dr. Reitsma's test results being stricken, Dr. Corbett declined to express an opinion on vacuum stability because it required testing for which he relied upon Dr. Reitsma.

The movement of air through a closed milking system involves principles of engineering, fluid dynamics and physics, not veterinary medicine.

The "diagnosis" of vacuum fluctuation is by means of an engineering test. It cannot be accomplished by differential diagnosis. Such an approach is contrary to *Kumho*. If this Court allows this case and *Bitler v. A.O. Smith Corp.*, 391 F.3d 1114 (10th Cir.2004) to stand it is a good bet, at least in the Tenth Circuit, that *Kumho* will be emasculated.

In support of its argument that the Tenth Circuit appropriately applied "reasoning to the best inference" in this case, Mariposa cites nine cases in which the Second, Fourth, Sixth, Eighth, Ninth and Tenth Circuits accepted differential diagnosis by medical professionals as an accepted methodology under *Daubert/Kumho*. In each case the reference is to a methodology known as "differential diagnosis" and is limited to the medical context. Mariposa, however, fails to demonstrate why differential diagnosis should apply in analysis of an engineering question when a definitive testing methodology is available.

Daubert, 509 U.S. at 593-94, specifies one of the appropriate questions to be whether the hypothesis can be tested. Here a test was available but not used because of serious misconduct by Mariposa and its counsel. To allow substitution of an untested hypothesis for testing is to reward Mariposa for its misconduct.

Daubert, 509 U.S. at 590, points out that an inference must be derived through a scientific method. Can one reason to the best inference when he does not use the most reliable basis for reaching a conclusion i.e. an accepted test?

In one of the cases cited by Mariposa, *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1057 (9th Cir. 2003), the Court puts differential diagnosis in its proper context when it states:

> A whole sub-body of *Daubert* law has developed with respect to the reliability, and admissibility, of differential diagnosis. Differential diagnosis is "the determination of which of two or more diseases with similar symptoms is the one from which the patient is suffering, by a systematic comparison and contrasting of the clinical findings." Stedman's Medical Dictionary 474 (26th ed. 1995) (hereinafter "Stedman's"). As described by the Fourth Circuit,
>
> > Differential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated. A reliable differential diagnosis typically, though not invariably, is performed after "physical examinations, the taking of medical histories, and the review of clinical tests, including laboratory tests," and generally is accomplished by determining the possible causes for the patient's symptoms and then eliminating each of these

> potential causes until reaching one that cannot be ruled out or determining which of those that cannot be excluded is the most likely.
>
> *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999) (citation and internal quotations omitted). [emphasis added]

As noted in *Hardyman v. Norfolk & Western Ry. Co.*, 243 F.3d 255, 260 (6th Cir. 2001) the Federal Judicial Center Reference Manual on Scientific Evidence 214 (1994) provides that "differential diagnosis" is defined as "[t]he method by which a physician determines what disease process caused a patient's symptoms." The manual goes on to point out that "[t]he physician considers all relevant potential causes of the symptoms and then eliminates alternative causes based on a physical examination, clinical tests, and a thorough case history." [emphasis added]

In *Bitler v. A.O. Smith Corp.*, 391 F.3d 1114,1123-24 (10th Cir. 2004), the case in which the Tenth Circuit adopted the "reasoning to the best inference" methodology, the Tenth Circuit recognized that, while other Circuits had applied differential diagnosis as an acceptable methodology, it was not clear that it was applicable outside the medical context.

The Tenth Circuit, after acknowledging that other Circuits had applied "differential diagnosis" methodology only in the medical context, adopted the methodology in an engineering case and said in that instance it was " a general method more aptly characterized as a process of reasoning to the best inference." *Bitler*, 391 F.3d at 1124.

The approach followed by the Tenth Circuit in *Bitler* and here can fairly be said to conflict with limitation of differential diagnosis to the medical context by all other Circuits and with *Daubert* and *Kumho*.

The District Court held that Dr. Reitsma's method of reaching a conclusion based upon an inspection of photographs and a discussion with the owner of the system was an inadequate methodology. Dr. Corbett did not even make a visual inspection. He merely said he had never seen mastitis spread this quickly without abnormally functioning milking equipment. How, then could Dr. Corbett's "reasoning to the best inference" be any more reliable than Dr. Reitsma's on an engineering question?

Kumho, 526 U.S. at 154, rejected a "general theory that, in the absence of evidence of abuse, a defect will normally have caused a tire's separation." It can fairly be stated that *Kumho* at 154-155 implicitly rejects "reasoning to the best inference" as a methodology appropriate in the field of engineering, particularly when a definitive testing methodology is available. Prior to trial Dr. Corbett conceded that ASAE testing was the standard for determining vacuum fluctuation in a milking system and that he was relying upon the testing done by Dr. Reitsma, which was excluded from evidence and from his consideration in reaching his conclusion that malfunctioning equipment injured Mariposa's cows.

There may be an inference that a bone is broken or that an intestine is perforated or that a condition is caused or not caused by infection. But why rely on an inference when a test would conclusively demonstrate whether the inference is correct? Here, to apply "reasoning to the best inference" is to allow an unsupported hypothesis to substitute for a conclusion based upon industry accepted testing.

CONCLUSION

It is respectfully submitted that now is the time to relegate "differential diagnosis" or "reasoning to the best inference" to its proper place in *Daubert/Kumho* law, the medical context.

This Court has twice addressed the limitations to be placed on expert testimony in a federal trial. Prevention of the erosion of the *Daubert/Kumho* principles is certainly worthy of this Court's attention.

Respectfully submitted ,

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